In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 756.

MID-VALLEY PIPELINE COMPANY,
Appellant,

vs.

DONALD R. KING, COMMISSIONER OF REVENUE,
Appellee.

MID-VALLEY PIPELINE COMPANY,
Appellant,

vs.

THOMAS D. BENSON, COMMISSIONER OF REVENUE,
Appellee.

(Three cases)

BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS APPEAL.

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BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS APPEAL.

The argument of Appellee in support of its Motion to Dismiss the Appeal herein is based almost solely on the proposition that the Tennessee franchise and excise taxes are imposed upon "the privilege of doing business *in corporate form*" and are not predicated upon the nature or extent of Appellant's *local* activities, if any, in the state. In the opening paragraph of Appellee's Argument it is stated

> "Though Appellant has persistently and vigorously emphasized the interstate character of its business activities and their commerce clause immunity to Tennessee

taxation, the record shows that the predicate for the questioned taxes is not the character of Appellant's business, but the manner and form in which that business is conducted." (Appellee's Motion, page 5.)

Again at page 9 of Appellee's Motion it is stated:

"A tax upon a corporation for the privilege of doing business is manifestly not synonymous with one upon a corporation for exercising its function *in corporate form and manner*. This distinction is one of substance and not of mere semantics."

The Supreme Court of Tennessee, while referring in its opinion to the activities of Appellant in employing or owning capital or property in the state and maintaining its right of way and other valuable properties in the state and expressing the belief that "such local activities although incidental to the conduct of interstate commerce are taxable * * *", does not rest its decision on such premise. The second last paragraph of the opinion (Jurisdictional Statement, Appendix A, page 33) summarizes the Court's conclusion as follows:

"The taxes are imposed upon the privilege of doing business in corporate form and are nondiscriminatory as they apply to all foreign corporations doing business in this state in corporate form."

I.

THE TAXES CANNOT BE SUSTAINED IF PREDICATED SOLELY ON THE CORPORATE FORM OF APPELLANT.

It is submitted that interstate commerce should be entitled to the protection afforded by the Commerce Clause of the federal constitution whether carried on by an individual, a partnership or a corporation. The State of Tennessee cannot deny to a corporation the right to engage in an exclusively interstate business in that state.

Where interstate commerce only is involved, a state franchise or privilege tax upon the doing of business "in corporate form" is just as objectionable constitutionally as the Connecticut franchise tax stricken down by this Court in *Spector Motor Service vs. O'Connor*, 340 U. S. 602 (1951) which the Supreme Court of Connecticut had construed as follows:

> "The tax is then a tax or excise upon the *franchise* of *corporations* for the privilege of carrying on or doing business in the state, whether they be domestic or foreign * * *." (Emphasis supplied.)

If in fact the complaining corporation is engaged exclusively in interstate commerce then it would seem to be merely a matter of semantics whether the taxing statute is construed to be a franchise or excise tax upon the doing of business "in corporate form", or a franchise or excise tax upon the franchise of the corporation "for the privilege of carrying on or doing business."

Additionally, there is another phase of this case which the Appellee has either intentionally or unwittingly overlooked. This involves the difference in the wording of the Tennessee statutes with respect to the privilege or activities upon which the *franchise tax* is predicated and those upon which the *excise tax* is predicated. For the convenience of the Court the provisions of the corporate franchise tax applicable for the taxable years 1963 and 1964 is attached hereto as Appendix A, for the taxable years 1965 and 1966 as Appendix B. The provisions of the excise tax for the taxable years 1963 and 1964 are attached as Appendix C and the provisions of the excise tax for the taxable years 1965 and 1966 as Appendix D.

Section 67-2902, Tennessee Code Annotated (Appendix A and Appendix B hereto) imposing the franchise tax reads as follows:

"The tax hereby imposed shall be paid for the privilege of engaging in business in corporate form in this state and shall be in addition to all other taxes levied by any other statute."

Section 67-2701, Tennessee Code Annotated (Appendix C and Appendix D. hereto) imposing the excise tax reads as follows:

"Every such taxable entity * * * shall as a *recompense* for the protection of its local activities and as *compensation* for the benefits it receives from doing business in Tennessee, pay the tax imposed by this chapter." (Emphasis supplied.)

Section 67-2902 (imposing the franchise tax) additionally contains the foregoing wording, but no reference is made in Section 67-2701 (imposing the excise tax) to "the privilege of engaging in business in corporate form in this state"—which is the language used in Section 67-2902 (imposing franchise tax). Notwithstanding this difference, the "corporate form" phrase is used by the Supreme Court of Tennessee as the basis of its decision as to *both* taxes.

The difference in the wording of the two Tennessee statutes makes it apparent that while "corporate form" may be significant in the proper construction of the *franchise tax* section it has no specific significance in the construction of the *excise tax* section—except that the imposition of both taxes is limited to corporations and certain other taxable entities. Thus, the activities of the Appellant in the State of Tennessee, and their separability from interstate commerce, must of necessity be brought into focus if *either* of the taxes are to be constitutionally sustained under the "recompense" and "compensation" clauses appearing in both sections of the Tennessee statutes.

The last mentioned clause does not define or enumerate the "local activities" which are supposed to be the predicate for the taxes. It does not detail (or even give examples of) the "benefits" which a corporation engaged exclusively in interstate commerce is supposed to receive "from doing business in Tennessee."

The Tennessee Supreme Court does not rest its decision on the "recompense" and "compensation" clauses. It devotes very little space in its opinion to the so-called "local activities" of Appellant and does not explain why such activities are sufficiently separable from interstate commerce as to justify the imposition of the privilege taxes.

II.

THE LOCAL ACTIVITIES OF APPELLANT ARE NOT SUCH AS TO JUSTIFY THE TAXES EITHER UNDER THE COMMERCE CLAUSE OR DUE PROCESS CLAUSE.

While this Court has given weight to the construction placed by the highest court of a state upon its privilege tax laws, in passing upon the question of constitutionality, this Court is not bound by a finding or determination of a state court that "local activities" are separable from the interstate commerce operations or are sufficiently localized to warrant state taxation. Furthermore this Court has repeatedly held that a state may not levy a privilege tax "on an integral part of interstate commerce." *Michigan-Wisconsin Pipe Line Co. vs. Calvert,* 347 U.S. 157, 166 (1954). See also *Joseph vs. Carter & Weekes Stevedoring Co.,* 330 U.S. 422 (1947); *Puget Sound Stevedoring Co. vs. Tax Commission,* 302 U.S. 9 (1937); *Richfield Oil Corporation vs. State Board,* 329 U.S. 69 (1946); *Murphy Steam Laundry Cleaner, Inc., vs. Stone,* 342 U.S. 389 (1952). Compare *State of Alaska vs. Arctic Maid et al.,* 366 U.S. 199 (1961).

In the case of *Joseph v. Carter & Weekes Stevedoring Co., supra,* this Court stated:

> "The *Puget Sound* opinion pointed out, p. 92 et seq., that transportation by water is impossible without loading and unloading."

It is equally true that *transportation by pipe line is impossible* without maintenance and operation of the pipe lines, pumping stations and micro wave communication system, which comprise the activities of the Appellant in Tennessee.

In view of the differences in the wording of the Tennessee statutes imposing the franchise tax and excise tax, respectively, it is submitted that in order to resolve the constitutional question as to each tax, separately, it is necessary for this Court to determine—

(a) in regard to the *franchise tax* whether Appellant may be subjected to a state privilege tax merely because it is a corporation without regard to whether

(i) it is engaged exclusively in interstate commerce,

(ii) if so, whether Appellant is conducting local activities within the state sufficiently separable from its interstate operations to form a nexus for a state privilege tax, and

(iii) whether such local activities have actually been made the predicate of the particular state privilege tax, and

(b) in regard to the *excise tax*

(i) whether Appellant is engaged in local activities sufficiently separable from interstate commerce, and

(ii) whether such local activities have actually been made the predicate of the excise tax.

In practically every case in which this Court has passed upon the constitutionality under the commerce clause of state privilege taxes (and state sales and use taxes) this Court has reviewed in detail the local activities of the taxpayer claiming to be engaged exclusively in interstate commerce. See *Spector Motor Service, Inc. vs. O'Connor,* 340 U.S. 602 (1951) and cases cited above.

In the *Spector* case this Court stated (page 609):

> "The State is not precluded from imposing taxes upon other activities or aspects of this (interstate) business which unlike the privilege of doing interstate business, are subject to the sovereign powers of the state."

In *General Motors Corporation vs. Washington, et al.,* 377 U.S. 436 (1963), involving the constitutionality of a Washington tax imposed upon the privilege of engaging in business activities in that state and measured by the gross wholesale sales of products delivered in that state, the Court stated:

> "The tax that Washington levied is measured by the wholesale sales of the respective General Motors Divisions in the State. It is unapportioned and as we have pointed out, is, therefore suspect. We must determine whether it is so closely related to the local activities of the corporation as to form 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax' *Miller Bros. vs. Maryland,* 347 U.S. 340, 344-345 (1954). On the basis of the facts found by the state court we are not prepared to say that its conclusion was constitutionally impermissible. *Norton Co. vs. Department of Revenue,* 340 U.S. 534 (1951), at page 538. Here just as in *Norton* the corporation so mingled its taxable business with that which it claims nontaxable that we can only 'conclude that in the light of all of the evidence' the judgment attributing

(the corporation's Washington sales to its local activity) was within the realm of permissible judgment."

It is true, as pointed out in Appellee's Motion, that this Court held constitutional a Mississippi privilege tax in *Memphis Natural Gas Co. vs. Stone,* 335 U.S. 80 (1948) which the State Supreme Court had held was imposed as a recompense as a protection for local activities carried on in Mississippi. The state statute enumerated certain local activities. In the *Memphis Natural Gas* case these consisted of maintaining, keeping in repair and otherwise in manning an interestate pipeline system. Actually the constitutionality of the tax was sustained on the theory that the tax levied was in substance an "additional ad valorem tax." This reasoning was severely criticised in the dissenting opinion of Justice Frankfurter and its applicability to any other set of facts has been questioned in subsequent decisions of this Court.

It is also true that *Spector* did not expressly overrule *Memphis Natural Gas* but as above stated this Court has in virtually all decisions subsequent to the *Spector* case, involving the constitutionality of the state privilege taxes, reviewed the local activities or incidents and has repeatedly stated that such claimed local activities must be *sufficiently separable and apart* from the Interstate Commerce activities *properly to form a nexus for the state privilege tax.* (*e.g. Michigan-Wisconsin Pipe Line Co. vs. Calvert, supra*). Such review of the factual situation would have been unnecessary were this Court now of the opinion that a state may constitutionally seize upon any local activity of a corporation engaged exclusively in interstate commerce and tax that activity. This Court does not appear willing to accept or approve such broad proposition and this is demonstrated by the decisions of this Court cited above.

Finally, in support of the contention that this Court should note jurisdiction in this Appeal, it was pointed out in Appellant's Jurisdictional Statement that there appears to be confusion among the highest courts of the several states with regard to the constitutionality of privilege taxes imposed upon companies engaged exclusively in interstate pipeline operations. (See cases cited in Jurisdictional Statement, page 22.)

More recently (May, 1968) the 19th Judicial District Court, Parish of East Baton Rouge, Louisiana in a suit instituted by Colonial Pipe Line Company against Ashton J. Mouton, Collector of Revenue, held that a Louisiana statute imposing a privilege tax on that company was unconstitutional where its business activities in Louisiana consisted of the pipe line transportation of liquid fuels exclusively in interstate commerce. The court construed the Louisiana tax statute as follows:

> "It levies this tax for the privilege of carrying on or doing business, the *exercising of its charter* or the continuance of its charter in this state. In this Court's opinion where the record shows as it does in this case that the privilege of carrying on or doing business is here limited strictly to the privilege of carrying on or doing an interstate business, *the exercising of its charter* or the continuance of its charter within this state *deals with the charter of a corporation that is strictly engaged in interstate commerce.* (Emphasis supplied.)
>
> * * * * *
>
> To sum up, it is the opinion of this Court that the imposition of this tax to the facts found in this case is unconstitutional in that it violates the commerce clause of the Constitution of the United States."

The Louisiana Court's opinion is unreported. A copy is appended hereto as Appendix E.

A decision of this Court on the constitutional questions raised by this Appeal may illuminate the constitutional path for state courts in future pipeline privilege tax cases.

It is, therefore, respectfully submitted that the Motion to Dismiss should be denied and that jurisdiction should be noted herein.

Respectfully submitted,

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NOTE TO APPENDICES A, B, C AND D.

For the convenience of the court we have set forth below Appendices A, B, C and D. Appendix A represents the franchise tax relating to the taxable years 1963 and 1964, and Appendix C represents the excise tax relating to the taxable years 1963 and 1964. Appendix B represents the franchise tax relating to the taxable years 1965 and 1966, and Appendix D represents the excise tax relating to the taxable years 1965 and 1966.

The provisions of the franchise tax and excise tax set out in the appendices to the Jurisdictional Statement related to the year 1967 and were incomplete.

The text of Appendix A differs from that of Appendix B in that the penalty section, 67-2924, is different in each statute.

The text of Appendix C differs from that of Appendix D in that the penalty section, 67-2716, is different in each statute.

As between the years 1963-64 and 1965-66, there is no difference in the wording of the franchise and excise statutes, respectively, with respect to the right or privilege upon which each of the taxes is imposed.